

NATIONAL ORGANIZATION FOR RIVER SPORTS ET AL.

IBLA 94-413, 414, 415, and 451

Decided March 14, 1997

Appeals from decisions of the District Manager, Vale, Oregon, District Office, Bureau of Land Management (BLM), denying protests of 1993 Main, West Little, and North Fork Owyhee Wild and Scenic Rivers Management Plan and Environmental Assessment. OR-030-92-11.

Affirmed.

1. Public Lands: Administration--Wild and Scenic Rivers Act

As a general rule, a BLM decision to approve a wild and scenic river management plan will be affirmed on appeal if the decision makers considered the relevant factors, the decision is supported by the record, and is in accord with statutory directives. The Board will not substitute its judgment for that of the experts employed by the Department to analyze the facts and to make recommendations in their particular fields of expertise in the absence of a showing that the decision is contrary to the evidence of record or otherwise arbitrary or capricious.

2. National Environmental Policy Act of 1969: Finding of No Significant Impact--Wild and Scenic Rivers Act

In reviewing the adequacy of an EA and a FONSI in the context of a challenge to a river management plan for a wild and scenic river, a FONSI will be affirmed on appeal if the record shows that a careful review of environmental issues has been made, relevant environmental concerns have been identified, and the final determination is reasonable.

APPEARANCES: John H. Garren, Portland, Oregon, for National Organization for River Sports; Ed Dowell, Jordan Valley, Oregon, for Jackies Butte Allotment Users; Deborah N. Mailander, Esq., Eugene, Oregon, for Bruce Anderson et al.; Aron Yarmo, Esq., Eugene, Oregon, for Oregon Natural Desert Association et al.; and Donald P. Lawton, Esq., Assistant Regional Solicitor, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

This case involves several appeals from March 1994 decisions of the District Manager, Vale, Oregon, District Office, Bureau of Land Management (BLM), denying protests of the decision of the BLM Jordan Resource Area Manager to adopt and implement the 1993 Main, West Little, and North Fork Owyhee Wild and Scenic Rivers Management Plan and Environmental Assessment (EA). 1/ These cases were consolidated for review by order of this Board dated May 20, 1994, on the ground they arise from a common factual context and present related legal issues.

The Oregon Natural Desert Association (ONDA) et al., filed a protest of the Plan/EA. 2/ The appeal of the ONDA group from denial of their protest has been docketed as IBLA 94-451. An appeal (IBLA 94-415) from the decision to adopt the Plan has also been filed by Bruce Anderson and others. 3/ A joint SOR has been filed by the ONDA and Anderson groups.

Protests of the Plan and EA were also filed by the National Organization for River Sports (NORS) and by Ed Dowell on behalf of the Jackies Butte Grazing Allotment Users. Appeals from decisions denying these protests have been docketed as IBLA 94-413 and IBLA 94-414, respectively.

Appellants in the ONDA and Anderson groups note in their SOR that 120 miles of the Main Owyhee River, 57 miles of the West Little Owyhee River, and 9 miles of the North Fork Owyhee river have been classified by Congress as "wild" rivers under the Wild and Scenic Rivers Act (WSRA), 16 U.S.C. §§ 1271-1287 (1994). Appellants assert that BLM is under a statutory duty pursuant to the WSRA, to prepare a management plan adequate to protect the outstandingly remarkable values (ORV's) which led to inclusion of the river in the Wild and Scenic River (WSR) System. 16 U.S.C. §§ 1274(d)(1), 1281(a) (1994). Further, Appellants contend that protection of these values is a statutory priority with protection of other uses allowed only to the extent consistent with protection of the ORV's (SOR at 8). It is argued that wild river designation requires protection in a presettlement state, prior to introduction of livestock (SOR at 9).

Appellants contend that the Plan improperly defers restriction of degrading uses such as livestock grazing pending results of monitoring efforts, despite acknowledging that ORV's are now being degraded (SOR

1/ U.S. Department of the Interior, Bureau of Land Management, Vale District, Main, West Little and North Fork Owyhee Wild and Scenic Rivers Management Plan and Environmental Assessment (September 1993) (hereafter cited as Plan, Plan/EA, or EA).

2/ Other protestants in the ONDA Group included the Oregon Wildlife Federation, Pacific Rivers Council, and Rest the West.

3/ Parties to this appeal include Edith Anderson, Dr. Bruce Becker, Carol Becker, Dr. Marvin Berkman, Carol Berkman, C. Frederick Meyer, and Kitty Meyer. It appears that these parties filed comments with BLM on the draft Plan and EA. See Ex. A to Statement Of Reasons (SOR) for appeal.

at 11-12). Further, it is asserted that the Plan fails to adequately protect wildlife values by precluding damage to riparian vegetation and water resources resulting from cattle grazing on riparian vegetation and polluting the water (SOR at 15). Similarly, Appellants argue that livestock use impacts recreational and scenic ORV's and that the failure of the Plan to restrict grazing breaches the duty to protect those values (SOR at 19).

In addition, Appellants contend that the EA and finding of no significant impact (FONSI) for the Plan violate section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. § 4332(2)(C) (1994), in that BLM failed to take a hard look at the environmental consequences of its Plan. Specifically, it is asserted that the EA fails to consider important alternatives, bases decisions on inadequate information, fails to adequately consider cumulative impacts, fails to adequately address mitigation measures, and fails to provide a basis for designation of the boundaries of the river corridor (SOR at 28-30). In particular, Appellants contend that BLM should have considered alternatives which would better protect key ORV's. Appellants contend that BLM's acknowledged lack of information regarding impacts to ORV's does not support a FONSI for the Plan. See SOR at 35-37.

Appellant NORS argues in its SOR that adoption of the Plan violates both the WSR and NEPA. Specifically, NORS contends that the carrying capacity of the river in terms of recreational use must be determined in order to establish a rational basis for the BLM decision that limitations on such use are not required at this time. Further, Appellant asserts that the Plan should address the method of allocation to be used if it becomes necessary to limit recreational use. Concern is expressed that the failure to make allocation decisions at this time effectively gives commercial outfitters (as distinguished from private boaters) a disproportionate share of recreation use because of the practice of recognizing grandfather rights to historical use levels. Appellant NORS contends, in effect, that a FONSI for the Plan cannot be sustained in the absence of addressing these issues.

The permittees licensed to graze cattle within the Plan area have also filed a SOR. They express the concern that they will be adversely affected by efforts of BLM to limit livestock access to the river, a major source of water for livestock. Grazing Appellants note that grazing has been an historic use of the area for at least 80 years and assert that this historic, cultural use should be preserved in the Plan.

Counsel for BLM has responded to the SOR's filed in these cases. In responding to the arguments raised by the ONDA group of Appellants, BLM references the criteria for WSR designation. The BLM notes that a limited amount of domestic livestock grazing or hay production may be considered "essentially primitive" qualifying for wild river status. Pointing out that only 10 percent of the WSR has been identified as having livestock

problems, BLM notes that the Plan calls for management of water gap and trail crossings to reduce livestock impacts. Further, BLM notes that if livestock are found to be causing impacts to ORV's, that use will be modified or eliminated as provided in the Plan.

With respect to designation of the boundaries of the WSR, BLM states that its discretion is limited by statute in that the acreage shall include an average of not more than 320 acres per mile on both sides of the river under 16 U.S.C. § 1274(b) (1994). Thus, expansion of the boundary at one point may require constriction of the boundary at another point. Noting the opportunity for public input in selection of the boundaries and the active participation of Bruce Anderson, one of the Appellants, BLM contends the boundaries should be upheld in the absence of a showing that BLM was arbitrary in selection of the boundary.

The BLM answer also responds to Appellants' challenges regarding compliance with the requirements of NEPA. Addressing the adequacy of the EA in terms of the alternatives considered therein, BLM points out that NEPA does not require consideration of every available alternative. The BLM argues that the EA includes detailed discussion of the environmental consequences of the alternatives including specific actions, mitigation measures, and effects. Regarding the impact of grazing within the allotments through which the WSR corridor passes, BLM notes that these impacts were addressed in the 1983 Southern Malheur Grazing Management Program Environmental Impact Statement.

With regard to analysis of the carrying capacity of the river, BLM asserts that the Plan addresses "user capacity" as required by statute. 16 U.S.C. § 1274(d)(1) (1994). The BLM points out that the District Manager's response to the NORS protest explained that physical capacity studies of campsites on the lower and middle segments of the Owyhee have been completed and, as a consequence, maximum group sizes and limits on number of launches per day have been imposed. The BLM indicates that allocation of use between commercial and noncommercial boaters will be deferred until such time as it appears that ORV's are threatened by recreational use.

Addition of the North Fork Owyhee River and the West Little Owyhee River to the WSR System with a classification of wild river by section 102 of the Omnibus Oregon Wild and Scenic Rivers Act of 1988, Pub. L. No. 100-557, 102 Stat. 2787, 2789, 16 U.S.C. § 1274(a)(91), (106) (1994), prompted development of a management plan for these rivers which was combined with an update of the Owyhee National Wild River Management Plan. See 16 U.S.C. § 1274(d) (1994). One stage of this process involved a determination of boundaries for the wild rivers. This effort was commenced by publication of notice in local newspapers in August 1989 inviting public input on location of boundaries through comments and participation in public meetings. Subsequently, in April 1991 notice was published and letters were sent to many concerned parties announcing a meeting to obtain public input on development of the Plan for the rivers. Thereafter, lists of identified issues/concerns were sent to these parties. Many of these

concerned parties also received the draft resource assessments for the North Fork Owyhee and West Little Owyhee Rivers. ^{4/} These documents analyzed scenic, recreational, geologic, historic cultural, prehistoric cultural, wildlife, and fisheries resources, endeavoring to evaluate the significance of those resources as a matter of "informed professional judgment and interpretation" (North Fork Owyhee Draft Resource Assessment at 4).

Thereafter, parties showing interest in the river Plan were sent a list of potential management action alternatives in order to obtain input.

In March 1992 a preliminary draft Plan/EA was distributed to parties which had previously provided input for their review and comment. Subsequently, in May 1992 the availability of the draft Plan/EA for public review and comment was announced by public notice and by letter to concerned parties.

In October 1993, after receipt of extensive public comments, notice of the availability of the Plan/EA was published in local newspapers to allow for public review and comment with respect to the Plan. Protests of the Plan/EA were subsequently filed and adjudicated by BLM.

The record discloses that management of livestock grazing within the river corridors was identified as one of the key issues in the Plan/EA (Plan/EA at 16). The BLM noted that 10 percent of the river system has identified livestock concerns including conflict with recreationists around campsites from cattle grazing and defecating, visual impacts of livestock trailing and grazing, and condition of upland riparian areas from cattle usage. Id. In particular, BLM noted the problem of "heavy [grazing] use near water gaps." Id. Also recognized by BLM as an issue is the potential impact of uncontrolled recreation use by boaters. Id. at 18. With respect to range management, the objective set forth in the Plan is to "[m]inimize livestock impacts * * * within the corridor, at water gaps/trail crossings by 1999." Id. at 30. Actions set forth in the Plan include restricting levels of vegetation use and management of water gaps and trail crossings to maintain or improve vegetative cover and reduce impacts of livestock through use of alternate sources of water, fencing, and improved herding practices. Id. at 31. Regarding recreation use, the stated objective is to manage use levels to protect and enhance "primitive type recreation

4/ U.S. Department of the Interior, Bureau of Land Management, Vale District, North Fork Owyhee National Wild River Draft Resource Assessment (May 1991); U.S. Department of the Interior, Bureau of Land Management, Vale District, West Little Owyhee National Wild River Draft Resource Assessment (May 1991). These analyses are cited herein, respectively, as North Fork Owyhee Draft Resource Assessment and West Little Owyhee Draft Resource Assessment.

opportunities." Id. at 34. Actions called for include mandatory registration of boaters, control of periods of use, boating group size, and, if monitoring indicates it is necessary to protect ORV's, limiting the number of launches per day and/or requiring launch permits. Id.

[1] The WSR requires BLM to protect and enhance those values that caused the designation of the rivers and surrounding corridor as components of the national WSR System. See 16 U.S.C. § 1281(a) (1994). 5/

A BLM decision to adopt a wild and scenic river management plan and an associated FONSI from that decision will be affirmed on appeal if the decision is based on a consideration of relevant factors, including an evaluation of the impacts on the ORV's which exist in the area, is supported by the record, and accords with statutory directives, absent a showing by a preponderance of the evidence that the factual predicate of the decision is in error. See The Steamboaters, 131 IBLA 223 (1994). The record in this case discloses that BLM carefully considered the impact of grazing and recreational boater use on ORV's in the Owyhee WSR area. Although the actions identified in the Plan/EA did not go as far as desired by the ONDA group of Appellants in restricting grazing within the WSR area or satisfy all the concerns of Appellant NORS regarding recreational use of the river, Appellants have not established that the Plan actions are not reasonably calculated to protect ORV's in accordance with statutory requirements. Despite the broad scope of review exercised by this Board, 6/ as a general rule we will not substitute our judgment for that of the experts employed by the Department to analyze the facts and to make recommendations in their particular fields of expertise, in the absence of a showing that the decision is contrary to the evidence of record or otherwise arbitrary or capricious. Deschutes River Landowners Committee, 136 IBLA 105, 110 (1996); see Eason Oil Co., 24 IBLA 221, 225 (1976). No such showing has been made in this case.

[2] With respect to the adequacy of the EA and the FONSI predicated thereon, impacts of plan implementation (Alternative A) were considered in the EA. Thus, it was noted in the EA that: "Trailing requirements would minimize impacts to soil and vegetation and associated resources such as wildlife by reducing areas of soil compaction, denuded vegetation, livestock feces, etc." (Plan/EA at 101). Similarly, the EA stated that: "Providing holding facilities outside the river corridors would reduce

5/ As noted by BLM, this mandate is subject to the caveat that BLM shall manage the lands in such a manner without "limiting other uses that do not substantially interfere with public use and enjoyment of these values." 16 U.S.C. § 1281(a) (1994).

6/ The Board possesses de novo review authority. United States Fish & Wildlife Service, 72 IBLA 218, 220-21 (1983).

impacts to vegetation within the corridor." Id. With regard to impacts to fish and wildlife, the EA indicated that: "Managing livestock gathering and trailing through the river canyons would benefit fish and wildlife habitat. Less impacts to shoreline vegetation and sedimentation would occur." Id. at 104. It was also noted that impacts to scenery would be reduced under Alternative A by reducing livestock impacts in riparian areas. Id. at 109. This Board has previously had occasion to address the adequacy of a FONSI in the context of a challenge to a river management plan for a WSR, holding that a FONSI will be affirmed on appeal if the record shows that a careful review of environmental issues has been made, relevant environmental concerns have been identified, and the final determination is reasonable. The Steamboaters, *supra* at 228. We find that Appellants have failed to carry the burden of showing error in the FONSI in this case for a course of action which should reduce the adverse impacts of grazing on the river corridors.

With regard to the assertion that an inadequate range of alternatives was considered in the EA, we similarly find that Appellants have failed to carry the burden of proof. The BLM had wide discretion in the alternatives to be considered and we find that consideration of the alternatives of no action, the complete removal of livestock grazing, and the preferred alternative which entailed restrictions on livestock grazing within the river corridors, constituted reasonable compliance with the statutory requirements. This range of alternatives was "sufficient to permit a reasoned choice." California v. Bergland, 483 F. Supp. 465, 488 (E.D. Cal. 1980); quoting Brooks v. Coleman, 518 F.2d 17, 19 (9th Cir. 1975); Western Colorado Congress, 130 IBLA 244, 247-48 (1994).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

C. Randall Grant, Jr.
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge